CRIMINAL MENTAL INCOMPETENCE ……Revised February 2018

(Note: *see also* Juvenile Mental Competence and Insanity; Criminal Insanity)

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I. INCOMPETENCE DEFINITION AND EFFECT

Competency proceedings are governed both by rules and statutes. In the event of a conflict between a rule and a statute, the court attempts to harmonize the two; however, the Court of Appeals has found that the rules and statutes governing competency determinations do not conflict. The Court also interprets provisions of a statute consistently with other related provisions. *State v. Bunton*, 230 Ariz. 51, 53, ¶ 6 (App. 2012).

Criminal Rule 11.1 provides:

> A person shall not be tried, convicted, sentenced or punished for a public offense, except for proceedings pursuant to A.R.S. § 36-3707(D)[1], while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense. Mental illness, defect or disability means a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms, including congenital mental conditions, conditions resulting from injury or disease and developmental disabilities as defined in A.R.S. § 36-551[2]. The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial.

Under A.R.S. § 13-4501(2):

> "Incompetent to stand trial" means that as a result of a mental illness, defect or disability a defendant is unable to understand the nature and object of the proceeding or to assist in the defendant's defense. In the case of a person under eighteen years of age when the issue of

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[1] Sexually violent person status and commitment.

[2] A.R.S. § 36-551(18): "Developmental disability" means … a severe, chronic disability that:
(a) Is attributable to cognitive disability, cerebral palsy, epilepsy or autism.
(b) Is manifested before age eighteen.
(c) Is likely to continue indefinitely.
(d) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care; (ii) Receptive and expressive language; (iii) Learning; (iv) Mobility; (v) Self-direction; (vi) Capacity for independent living; (vii) Economic self-sufficiency; (e) Reflects the need for a combination and sequence of individually planned or coordinated special, interdisciplinary or generic care, treatment or other services that are of lifelong or extended duration.

> competency is raised, incompetent to stand trial also means a person who does not have sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the person. The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial.

Under A.R.S. 13-4502(A), "A person shall not be tried, convicted, sentenced or punished for an offense if the court determines that the person is incompetent to stand trial." However, the case may still proceed on other issues:

> The prosecutor or defense attorney may file any pretrial motion at any time while the defendant is incompetent to stand trial. The court shall hear and decide any issue presented by the motion if the defendant's presence is not essential for a fair hearing as determined by the court.

A.R.S. § 13-4502(B).

The United States Supreme Court established the federal standard for competence to stand trial in *Dusky v. United States*, 362 U.S. 402 (1960). The test is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *State v. Mendoza-Tapia*, 229 Ariz. 224, 231, ¶ 22 (App. 2012), *quoting Dusky,* at 402. The common law prohibition against trying the mentally incompetent is a byproduct of the ban against trials in absentia, as "the mentally incompetent defendant, though physically in the courtroom, is in reality afforded no opportunity to defend himself." *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975). Due process thus requires that "the state observe procedures adequate to protect a defendant's right not to be tried or conviction while incompetent." *State v. Mendoza-Tapia*, 229 Ariz. 224, 231, ¶ 22 (App. 2012), *quoting Drope*, *supra*, at

172. A trial judge is under a continuing duty to inquire into a defendant's competency. *Mendoza-Tapia*, 229 Ariz. at 231, ¶ 22.

The sole purpose of Rule 11 proceedings is to determine whether the defendant has sufficient mental ability for the adversarial system to operate properly. Fundamental fairness requires that a defendant “be armed with some minimal awareness of reality before the power of the state is exerted against him.” *Bishop v. Superior Court*, 150 Ariz. 404, 407 (1986). But even competent defendants may make objectively unreasonable choices. "Competent choices are not to be equated with wise choices; competent defendants are allowed to make choices that may not objectively serve their best interests." *State v. Kayer*, 194 Ariz. 423**,** 434, ¶ 38 (1999) *cert. denied* 120 S.Ct. 1259, 146 L.Ed.2d 115 (2000). The test for determining competency is not whether the defendant acted in his or her own best interests, but whether he or she possessed the ability to make a reasoned choice and to understand the consequences of that decision. *State v. Brewer*, 170 Ariz. 486, 495 (1992).

Competency is an extremely narrow issue focused on the test articulated by Rule 11.1, Ariz. R. Crim. P. *State v. Lewis*, 236 Ariz. 336, 340, ¶ 9 (App. 2014), *review denied* (Sept. 1, 2015). Rule 11.1 provides that a person may not be tried, convicted, sentenced or punished “while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense,” and defines “mental illness, defect or disability” as “a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms.” But it also provides that the mere presence of a mental illness, defect, or disability “is not grounds for finding a defendant incompetent to stand trial.” Rather, the test for

competence is whether that mental illness or defect renders a criminal defendant "unable to understand the proceedings against him or her or to assist in his or her own defense." *State v. Moody*, 208 Ariz. 424, 444, ¶ 56 (2004).

Thus, mental illness alone does not preclude a finding of competency to stand trial. *Rider v. Garcia ex rel. County of Maricopa*, 233 Ariz. 314, 317, ¶ 12 (App. 2013); *see also State v. Rose*, 231 Ariz. 500, 507, ¶ 28 (2013) (where expert considered defendant "psychotic" but "never felt that defendant was incompetent," and that "his symptoms have not prevented him from fully assisting counsel or understanding his legal proceedings," and defendant never disputed competency, no competency hearing was required before guilty plea). Further, a defendant found to have an intellectual disability is "not shielded from trial" automatically. *State v. Lewis*, 236 Ariz. 336, 340, ¶ 9 (App. 2014), *review denied* (Sept. 1, 2015), *quoting State v. Grell,* 212 Ariz. 516, ¶ 38 (2006).

A. Juveniles Prosecuted as Adults

There is a separate statutory scheme governing competency in the context of juvenile court. *See* A.R.S. §§ 8-291-291.11; AZ Brief-Revised Juvenile Competence and Insanity. Under A.R.S. § 8-291(2):

> "Incompetent" means a juvenile who does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the juvenile. Age alone does not render a person incompetent.

Although Criminal Rule 11.1 does not contain this verbiage, the second sentence of A.R.S. § 13-4501(A)("In the case of a person under eighteen years … incompetent to stand trial also means a person who does not have sufficient present ability to consult

with the person's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the person") may apply in the context of a juvenile prosecuted as an adult under A.R.S. §§ 13-501 (*i.e*., direct file cases). Those initially charged in juvenile court but transferred for adult prosecution by the juvenile court are subject to Juvenile Rule 34(E)(3), which provides: "The court shall not transfer a juvenile for criminal prosecution who is not competent." Once the juvenile is transferred, only the criminal rules apply.

B. Competence to Waive Counsel

Both the federal and state constitutions guarantee the right to waive counsel and represent oneself. U.S. Const. amend. VI and XIV; *Faretta v. California,* 422 U.S. 806, 836, (1975); Ariz. Const. art. 2, Section 24; *State v. Cornell,* 179 Ariz. 314, 324 (1994). However, a waiver of counsel must be made voluntarily, knowingly, and intelligently. *Edwards v. Arizona,* 451 U.S. 477, 482 (1981); *State v. Cornell,* 179 Ariz. 314, 322 (1994). The Arizona Rules of Criminal Procedure provide mechanisms for asserting and waiving the corollary rights. Reflecting its constitutional underpinnings, Rule 6 prescribes: "[a] defendant may waive his or her rights to counsel ... in writing, after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them." *State v. McLemore*, 230 Ariz. 571, 575 ¶ 14 (App. 2012), quoting Rule 6.1(c), Ariz. R. Crim. P. An erroneous failure to accord a defendant his properly asserted right to represent himself when he is competent to waive counsel in a criminal case is structural error requiring reversal without a showing of prejudice. *McLemore*, 230 Ariz. at 575-576, ¶ 15.

Although the federal and state constitutions guarantee a defendant the right to waive counsel and to represent himself, a mentally incompetent defendant cannot validly waive the right to counsel. *State v. Gunches*, 225 Ariz. 22, 24, ¶ 9 (2010), *citing State v. Djerf,* 191 Ariz. 583, 591 ¶ 21 (1998). Under the Due Process Clause of the Fourteenth Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial. *Gunches*, 225 Ariz. at 24, ¶ 9, *citing Godinez v. Moran,* 509 U.S. 389, 399 (1993). A defendant is competent to stand trial if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. *Gunches*, 225 Ariz. at 24, ¶ 9, *citing Dusky v. United States*, 362 U.S. 402, 402 (1960).

Indiana v. Edwards, 554 U.S. 164 (2008), recognized that some "gray-area" defendants may be competent to stand trial but unable to carry out the basic tasks needed to present their own defenses without the help of counsel. *Edwards* allows, but does not require, states to apply a heightened standard and insist upon representation by counsel for certain "gray-area" defendants. But it does not give such a defendant a constitutional right to have his request for self-representation denied. *State v. Gunches*, 225 Ariz. 22, 24-25, ¶¶ 10-11 (2010) (holding even if Arizona courts would apply a heightened standard of competency to waive counsel, no error under facts of case.).

A competency hearing is required only if under the facts and circumstances known to the trial judge, there was or should have been a good faith doubt about the defendant's ability to participate intelligently in the proceedings. The critical inquiry is whether the defendant has sufficient present ability to consult with his lawyer with a

reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him. *State v. Delahanty*, 226 Ariz. 502, 504-505, ¶8 (2011), *citing Dusky v. United States,* 362 U.S. 402 (1960). The test for whether a competency hearing is mandated is not whether a defendant was insane at some time in the past or even whether he was free of all mental illness at the time of the waiver, but rather whether there was a basis for the trial judge to doubt the defendant's ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among the alternatives presented. *State v. Cornell*, 179 Ariz. 314, 322-323 (1994). Once a court has determined that the defendant made a competent waiver of counsel, it is not within the court's province to force counsel on the defendant. *Id*. at 323.

Self-representation is not precluded by an insanity defense, nor does such a defense require that a competency hearing be conducted before the defendant is allowed to represent himself:

> Although it may not be wise to combine an insanity defense with self-representation, Defendant's argument confuses the wisdom of his waiver with its constitutional propriety. It amounts to a complaint that, even if Defendant knew what he was doing, and thus had the right to waive counsel, the court should have stopped him from making an unwise choice.

State v. Cornell, 179 Ariz. 314, 324 (1994). *See also State v. Mott,* 162 Ariz. 452, 459-460 (App.1989) (defendant's obstinacy, disrespect and bizarre behavior, including singing Elvis gospel song to jury, did not require trial court to conduct continuous hearings on his competence to waive counsel).

Finally, in a capital case Rule 11.2(a) requires the court to order that the

defendant undergo mental health examinations. *See* Capital Cases, *infra*, p. 14. However, the standard for competency for self-representation is no higher in a capital case. *See State v. Gunches*, 225 Ariz. 22, 25, ¶ 11 12 (2010)(defendant competent to waive right to counsel and represent himself in capital murder prosecution, where three doctors found him competent to stand trial and another found him competent to waive counsel); *State v. Djerf*, 191 Ariz. 583, 591-592, ¶¶ 23-28 (1998)(evidence established capital murder defendant's competency and failed to disclose reasonable grounds that would justify a competency hearing, where preliminary psychiatric report stated he was competent to stand trial, represent himself, and enter a plea agreement, and concluded he had rational and factual understanding of charges and proceedings against him).

C. Competence to Plead Guilty

Although the United Supreme Court expressly has rejected, as a constitutional requirement, that two different competency standards apply to defendants facing trial and those waiving their rights to trial, "[s]tates are free to adopt competency standards that are more elaborate than the *Dusky* formulation." *Godinez v. Moran,* 509 U.S. 389, 396–97, 402 (1993). Arizona has a heightened standard for competency to plead guilty.

In *State v. Rose*, 231 Ariz. 500, 507, ¶ 26 (2013), the Arizona Supreme Court reaffirmed, "'we will not uphold a guilty plea, where competency has been a valid issue, absent a proper finding of competency,'" *quoting State v. Bishop,* 139 Ariz. 567, 571 (1984). The Court identified as the standard for pleading guilty the following passage from *State v. Brewer,* 170 Ariz. 486, 495 (1992): "A criminal defendant is not competent to plead guilty where mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and understand the nature of

the consequences of his plea." *Rose*, 231 Ariz. at 507, ¶ 26. The Court recognized that when the record raises "'sufficient doubt of defendant's competency to enter a plea of guilty,'" remand is required to determine whether he made "'a rational and reasoned decision in entering the plea.'" *Rose*, 231 Ariz. at 507, ¶ 26, *quoting State v. Wagner,* 114 Ariz. 459, 462–63 (1977). But it emphasized that "a competency evaluation and hearing are not required in all cases in which the defendant pleads guilty." *Rose*, 231 Ariz. at 507, ¶ 26.

There, the Court concluded Rose was not entitled to a determination of competency to plead guilty for the following reasons: during prior unrelated mental health examinations no expert had suggested he was incompetent to either stand trial or plead guilty; one expert opined that his symptoms had not prevented him from fully assisting counsel or understanding his legal proceedings; and neither counsel nor the court had pursued any further testing or evaluations concerning his competency. Thus, "preliminary mental health reports and other evidence provide[d] no reasonable grounds to justify a competency hearing." *Rose*, 231 Ariz. at 507, ¶¶ 27–28.

II. REQUEST FOR COMPETENCY EXAMINATION

Requests for competency examinations are governed by A.R.S. § 13-4503 and Rule 11.2, Ariz. R. Crim. P.

Any time after the prosecutor charges a crime by complaint, information or indictment, any party or the court on its own motion may request in writing that the defendant be examined to determine the defendant's competency to stand trial, to enter a plea or to assist the defendant's attorney. The motion must state the facts on which the mental examination is sought. A.R.S. § 13-4503(A). Rule 11.2(a) has the same

provisions, but also includes an examination “to investigate the defendant's mental condition at the time of the offense.” Additionally, Rule 11.2(a) provides for insanity screening: “On the motion or with consent of the defendant, the court may order a screening evaluation for a guilty except insane plea under A.R.S. § 13-502 to be conducted by a mental health expert.” *See* Insanity, AZ Brief -- Revised.

Within three working days after the motion is filed, the parties must provide all available medical and criminal history records to the court. A.R.S. § 13-4503(B); Rule 11.2(b). The court may request that a mental health expert assist the court in determining if reasonable grounds exist for examining a defendant (*i.e.*, prescreen). A.R.S. § 13-4503(C); Rule 11.2(c). Once any court determines that reasonable grounds exist for further competency proceedings, the superior court has exclusive jurisdiction over all competency hearings. A.R.S. § 13-4503(D); Rule 11.2(D). Rule 11.2(D) further provides: “If any court determines that competence is not an issue, the matter shall be immediately set for trial.”

A. Any Party

Regarding “any party,” the Comment to Rule 11.2 notes: “The State must have the right to request an examination to determine competency, since the U. S. Supreme Court has held that the failure to make a determination of competency when reasonable grounds appear is fundamental constitutional error.,” *citing* Pate v. Robinson, 383 U.S. 375 (1966). The Comment further notes: “The motion is also available to a co-defendant, who might be interested in the determination of the defendant's mental condition.”

B. Any Court

Regarding “any court,” the superior court has exclusive jurisdiction to make the ultimate decision regarding competency. Rule 11.2 plainly permits any party in any court, which necessarily includes a court of limited jurisdiction, to file a motion seeking a determination of competency, and gives any court authority to address the motion and decide whether reasonable grounds exist to investigate competency. Subsection (c) of the rule permits the court to order a preliminary examination to assist it in deciding whether reasonable grounds exist. But, distinguishing “any court” from the superior court, subsection (d) vests the superior court with exclusive jurisdiction to conduct proceedings beyond the preliminary reasonable grounds determination and to make the ultimate determination of the defendant's competency to stand trial. Thus, the rule plainly provides that, if the court making the reasonable grounds determination is not the superior court, the case must be transferred immediately to the superior court for the appointment of mental health experts. *Potter v. Vanderpool*, 225 Ariz. 495, 499 ¶ 10 (App. 2010).

Rule 11.2 makes clear that lower courts have authority to make the reasonable grounds finding under Rule 11.2, and that the superior court's role is to conduct further competency proceedings. But nothing in Rule 11.2 suggests that once the case is transferred, the superior court may review the lower court's finding and decide anew whether reasonable grounds exist to examine a defendant's competency. The plain language of Rule 11.2(d) provides that once a lower court has made that finding, the matter is immediately transferred to the superior court “for appointment of mental health

experts" and further proceedings that lower courts lack authority to conduct. *Potter v. Vanderpool*, 225 Ariz. 495, 499 ¶ 12 (App. 2010).

C. The Court on its Own Motion

Judges may be required to order the hearing based on their own observations. "Due process requires the judge to raise the issue and hold the hearing *sua sponte* if it appears to the judge at any time that competency is in doubt." *Bishop v. Superior Court*, 150 Ariz. 404, 407 (1986). Further, a trial judge is under a continuing duty to inquire into a defendant's competency. *State v. Mendoza-Tapia*, 229 Ariz. 224, 231, ¶ 22 (App. 2012).

D. Capital Cases

Rule 11.2(a) requires: "In a capital case, the court must order the defendant to undergo mental health examinations as required under A.R.S. §§ 13-703.02 and 13-703.03." (Now A.R.S. §§ 13-753 and 13-754). When the State seeks the death penalty, A.R.S. § 13-754 requires the trial court to appoint a mental health expert to conduct a prescreening evaluation to determine whether there is a reasonable basis to order further examination of the defendant's competence to stand trial. Because the statutory language is mandatory, it is error to not order an evaluation. *State v. Delahanty*, 226 Ariz. 502, 504, ¶ 7 (2011). Under § 13-753, the court must *sua sponte* order a prescreening expert to determine the defendant's IQ; the expert must personally test a defendant in order to determine a defendant's IQ, not merely review previous tests. *State ex rel. Thomas v. Duncan*, 222 Ariz. 448, 452, ¶ 21 (App. 2009), *as amended* (Nov. 6, 2009). However, both §§ 13-753 and 754 contain the language "unless the defendant objects." Therefore, this issue may be waived.

Where a capital defendant objects to and thereby waives the pretrial intellectual disability evaluation required under § 13-753(B), he cannot later void his waiver by withdrawing his objection. However, a defendant's waiver does not deprive the trial court of its discretionary authority to order such an evaluation if the defendant later requests or consents to one. The court's authority to order an examination is not unlimited; because a defendant has the right to object to an evaluation, the court may not order an examination unless the defendant either requests or consents to the examination. Additionally, in making a post-waiver determination, the court must consider whether ordering an evaluation would prejudice the state or the victims. Such prejudice includes, but is not limited to, whether the evaluation would require the court to continue an existing trial date. Moreover, if the court, after considering all the above factors, decides to deny the defendant's request, the defendant may still offer evidence of his intellectual disability status during the penalty phase. *State v. Gates*, 2018 WL 910928 (2018)

E. Post-Conviction Proceedings

Neither A.R.S. § 13-4041(B) (requiring ASC to appoint PCR counsel in death penalty cases) nor Rule 32.5, Ariz. R. Crim. P. (requiring defendant declare under oath that information in PCR petition is true to best of knowledge and belief) requires a trial court to determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition. But a court, in its discretion, may order a competency evaluation if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain Rule 32 claims and, if so, the court should order the evaluation as soon as practicable even if the PCR proceeding is not stayed. *Fitzgerald v. Hon. Myers*,

WL 4251530, ¶ 1 (Sept. 26, 2017). Any stay that is ordered should be limited in duration and scope (for example, allowing purely record-based claims to proceed in the interim) so as to protect the rights of the State and victims to finality as well as the petitioner's right to a prompt ruling on legal and strictly record-based claims. *Id*., ¶ 25.

Note that ASC did not consider Fitzgerald's due process arguments as they were untimely raised after oral argument, *id*., n. 2, and emphasized the limited nature of its holding in this case. *Id*., ¶ 27. ASC noted that in the sound exercise of its inherent authority and discretion, a trial court may order a competency evaluation when helpful or necessary in a capital case PCR proceeding. The Court decided to leave for another day whether due process may require in a particular capital case (or a non-capital case) a competency evaluation and determination with respect to certain proffered PCR claims. Nor did the Court decide what the applicable standards should be for evaluating a PCR petitioner's request for a competency determination or for that determination itself. *Id*., ¶¶ 27, 28. The Court concluded only that on the record of this case, the trial court did not abuse its discretion in declining to exercise its inherent authority by ordering a competency evaluation; Fitzgerald failed to provide any indication of the assistance that he was unable to provide at that stage of the proceedings or that his assistance at this point was essential, and was represented by competent and experienced counsel capable of reviewing the record, conducting an investigation, and identifying potential claims to be raised in a PCR petition. *Id*., ¶ 29.

There was a concurring opinion which agreed with the result but disagreed with the majority's holding that there is no right to competency in Rule 32 proceedings for certain claims. The dissent opined that based on the statutory scheme and the related

rules of procedure, capital defendants have a right to competency for non-record based claims in Rule 32 proceedings (such as ineffective assistance of counsel) when raising those claims is dependent upon the petitioner's ability to effectively communicate with PCR counsel. *Id*., ¶ 41-43.

III. APPOINTMENT OF EXPERTS

A.RS. 13-4505 is entitled “Appointment of experts; costs” and sets forth the basic framework for competency examinations. Rule 11.3(a) contains the same general framework as the statute. *State v. Bunton*, 230 Ariz. 51, 53, ¶ 7 (App. 2012).

If the court finds reasonable grounds for a competency examination, it must appoint two or more mental health experts to examine the defendant, issue a report and, if necessary, testify about the defendant's competency. The court may on its own motion or upon motion of any party order that one expert be a psychiatrist. A.R.S. § 13-4505(A); Rule 11.3(a). Reasonable grounds exist if there is sufficient evidence to indicate the defendant is unable to understand the nature of the proceedings against him and assist in his defense. In determining whether reasonable grounds exist, the trial court may rely on its own observations. *State v. Mendoza-Tapia*, 229 Ariz. 224, 231, ¶ 23 (App. 2012).

Further, if a defendant has previously been found competent, the court must be permitted to rely on the record supporting that previous adjudication. *State v. Moody*, 208 Ariz. 424, 442-43, ¶ 48 (2004). Standing alone, conduct intended to disrupt the judicial process is insufficient to require an additional Rule 11 examination after an initial determination of competency. *State v. Amaya-Ruiz*, 166 Ariz. 152, 163 (1990); *see also State v. Taylor,* 160 Ariz. 415, 418 (1989) (refusal to cooperate with mental health

experts). And, standing alone, a suicide attempt does not mandate a rule 11 examination where there has been a prior finding of competency. *Amaya-Ruiz*, 166 Ariz. at 163; *see also State v. Messier,* 114 Ariz. 522 (App.1977)(upholding refusal to grant Rule 11 exam where defendant found competent only three months before in another case and only new evidence was recent suicide attempt).

If necessary, the court can order the defendant to submit to physical, neurological, or psychological examinations to adequately determine his or her mental condition. A.R.S. § 13-4505(B). The defendant must pay the costs of the examination. If the defendant is indigent or if the prosecution requested the examination, the county must pay, and if the case is referred by a municipal judge then the city must pay. A.R.S. § 13-4505(C).

Any party can retain its own expert to conduct additional examinations at its own expense. A.R.S. § 13-4505(D). Although § 13–4505(D) permits both parties to retain their own experts for the purpose of conducting additional examinations, it does not require a court to order a defendant to submit to examination by such additional experts. When § 13–4505(D) is interpreted consistently with § 13–4505(B) and is harmonized with Rule 11.3, it grants the court discretion over whether to order a defendant to submit to any additional examination. Thus, the court has discretion to reject the State's request that the defendant submit to an additional examination by the State's expert. *State v. Bunton*, 230 Ariz. 51, 53, ¶ 8 (App. 2012). *See* State Experts, *infra*, p. 17, and Additional Experts, *infra*, p. 18.

A “mental health expert” means any physician licensed under A.R.S. §§ 32-1401 *et seq*., 32-1800 *et seq*. or psychologist licensed under A.R.S. § 32-2061 *et seq*. The

expert must be familiar with Arizona competency standards and statutes, as well as treatment, training and restoration programs available in Arizona. The expert must also be approved by the court as meeting court-developed guidelines. Guidelines must include experience in forensics matters, a mandatory court-approved training program of at least 16 hours and any continuing forensic education programs required by the court, and annual review criteria. Rule 11.3(b), Ariz. R. Crim. P. The appointed expert or clinical liaison is entitled to immunity, except for intentional, wanton or grossly negligence. A.R.S. § 13-4505(E).

The moving party may include a list of three qualified experts; the other party may also include such a list in a response. If the court finds reasonable grounds for a competency examination, it must appoint two or more experts from its approved list to examine the defendant and order them to report to the court in writing within 10 days after examination of the defendant and, if necessary, testify about the defendant's competence. An appointed expert who is unable to timely conduct the examination must immediately inform the court and another expert must be appointed. If the court approves, the prosecution and the defense may stipulate to the appointment of only one expert. Rule 11.3(c), Ariz. R. Crim. P. In Maricopa County, experts are selected randomly from a list. Although previously one expert was required to be a psychiatrist, both experts may now be psychologists. *See* A.R.S. § 13-4505(A); Rule 11.3(a)(the court may on its own motion or upon motion of any party order that one expert be a psychiatrist).

A. State Experts

When the defendant puts his or her mental condition in issue, the trial court may order the defendant to be examined by an expert chosen by the State. In addition, an expert may require additional testing and examination before an official opinion can be made. A defendant offering expert mental health testimony must either submit to a State examination or forego introducing his own evidence. The State's examination need not mirror that of the defense. Rather, the State is entitled to a meaningful opportunity to rebut the defendant's expert testimony. *State v. Cota*, 229 Ariz. 136, 146, ¶ 37 (2012) (court did not err in ordering defendant to submit to MMPI requested by State's expert), *citing Phillips v. Araneta*, 208 Ariz. 280, 283, ¶ 8 (2004) (as applied to capital penalty phase).

B. Additional Experts

Under Rule 11.3(g) the court has discretion to appoint additional experts and order the defendant to submit to physical, neurological or psychological examinations if necessary. The Comment to that rule notes that occasionally, the mental health expert may desire the assistance of other experts to carry out physical, neurological or psychological tests. Rule 11.3(g) authorizes the court to appoint additional experts, and to order the defendant to undergo further examinations and tests. The reports of these experts should include the required summary and be attached to the mental health expert's report.

But the court also has discretion to refuse a request for additional examination. Both Rule 11.3(g) and § 13-405(B) give the trial court discretion to order the defendant to submit to "necessary" examinations. And although § 13-4505(D) permits both parties

to retain their own experts for additional examinations, it does not require a court to order a defendant to submit to examination by such additional experts. When § 13–4505(D) is interpreted consistently with § 13–4505(B) and is harmonized with Rule 11.3, it grants the court discretion over whether to order a defendant to submit to any additional examination. Thus, the court has discretion to reject the State's request that a defendant submit to an additional examination by the State's expert. *State v. Bunton*, 230 Ariz. 51, 53-54, ¶¶ 8-10 (App. 2012).

C. Custody Status

Under Rule 11.3(d), the custody status of the defendant during an examination is determined pursuant to A.R.S. § 13-4507. Under that statute, the court must set and may change the conditions under which the examination is conducted. A.R.S. § 13-4507(A). Defense counsel must be available to the expert conducting the examination. A.R.S. § 13-4507(B). A proceeding to determine competency may not delay a judicial determination of eligibility for pretrial release; a defendant who is otherwise entitled to release may not be involuntarily confined or taken into custody solely because of a competency issue and examination unless the court finds confinement is necessary for the evaluation process. A.R.S. § 13-4507(C).

If a defendant is released, the court may order the defendant to appear at a designated time and place for an outpatient examination and may make this appearance a condition of release. A.R.S. § 13-4507(D). The court may order that the defendant be involuntarily confined until the examination is completed if it finds: (1) the defendant will not submit to outpatient examination as a condition of release; (2) the defendant refuses to appear for an examination; (3) an adequate examination is

impossible without confinement; or (4) the defendant is a threat to public safety. A.R.S. § 13-4507(E). Commitment for inpatient examination may not be longer than 30 days, but may be extended by 15 days if warranted by extraordinary circumstances. The county pays the costs of any inpatient examination unless ordered by a municipal judge, in which case the city pays. A.R.S. § 13-4507(F).

D. Content of Expert Reports

Rule 11.3(e) requires that the experts' reports conform to A.R.S. § 13-4509. That statute provides that the written report must be submitted within 10 working days after the examination and include at least: (1) the name of each expert who examines the defendant; (2) a description of the nature, content, extent and results of the examination and any test conducted; (3) the facts on which the findings are based; and (4) an opinion on competency. A.R.S. § 13-4509(A). If the mental health expert opines the defendant is incompetent, the report must also include: (1) the nature of the mental disease, defect or disability causing the incompetency; (2) the prognosis; (3) the most appropriate form and place of treatment based on the defendant's therapeutic needs and potential threat to public safety; and (4) whether the defendant is incompetent to refuse treatment and should be subject to involuntary treatment. A.R.S. § 13-4509(B). Finally, if the examiner determines the defendant is currently competent because of ongoing treatment with psychotropic medication, the report must address the necessity of continuing that treatment and include a description of any limitations the medication may have on competency. A.R.S. § 13-4509(C).

Rule 11.3(f) regards reports on guilty except insane pleas. *See* AZ Brief – Revised, Insanity.

IV. DISCLOSURE OF MENTAL HEALTH EVIDENCE

Rule 11.4(a), Ariz. R. Crim. P., pertains to the reports of appointed experts. Such reports must be submitted to the court within 10 working days of the completion of the examination and be made available to all parties, except any statement or summary of the defendant's statements about the crimes charged are available only to the defendant. (***See* Privilege, *infra***.) Upon receipt, court staff must copy and distribute the expert's report to the court and to defense counsel; defense counsel is responsible for editing a copy for the State, which must be returned to court staff within 24 hours of receipt and made available for the State. Rule 11.4(b) pertains to the reports of other, *i.e*., privately retained, experts. It requires that at least 15 working days before any hearing, the parties must make available to the opposing party for examination and reproduction the names and addresses of mental health experts who have personally examined a defendant or any evidence in the particular case, together with the results of mental examinations of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with the particular case.

The Comment to Rule 11.4(a) notes that all expert reports produced pursuant to Rule 11 must be disclosed to all parties. “Only one item of the report is excepted – summary of the defendant's statements.” Giving a non-redacted report to the State is error. *State v. Decello,* 113 Ariz. 255, 257 (1976). However, the error may be cumulative, *State v. Ramirez,* 116 Ariz. 259 (1977), or not prejudicial, *State v. McDonald,* 117 Ariz. 159, 160 (1977), and thus may not require reversal.

Rule 11.4(b), encompassing retained experts, contains no similar exemption and need not be construed the same as Rule 11.4(a); a defendant who voluntarily makes

statements to a non-court-appointed expert is not being compelled by a court order to participate in a mental health examination, and the privilege against self-incrimination is not implicated. *State v. Hon. Hegyi (Rasmussen)*, -- Ariz. --, ¶¶ 14-17 (App. June 23, 2016), overruling *Austin v. Alfred*, 163 Ariz. 397, 400 (App. 1990), and holding that as a matter of law, a defendant examined by a non-court-appointed expert cannot, after giving notice of intent of the guilty except insane defense, redact his statements from the report under Rule 11.4(b).

V. PRIVILEGE

During mental health examinations, the defendant is protected by the Fifth Amendment privilege against self-incrimination. Rule 11.7, Ariz. R. Crim. P.; A.R.S. § 13-4508 (A). Generally, the defendant's statements during examinations cannot be used against him in any proceeding to determine his guilt or innocence, unless he presents evidence intended to rebut the presumption of sanity. Rule 11.7(a); A.R.S. § 13-4508 (B). No privileged statement of the defendant, or evidence resulting therefrom, is admissible at trial without the defendant’s consent. Rule 11.7(b)(1); A.R.S. § 13-4508(D). Rule 11.7(b)(1) privileges absolutely any statement made by the defendant during the course of the examination which concern the events from which the criminal charges stem. Comment, Rule 11.7. Further, any statement made by the defendant during an examination or any evidence resulting from that statement concerning any other event or transaction is not admissible to determine the defendant’s guilt or innocence in any other criminal proceeding. Rule 11.7(b)(2); A.R.S. 13-4508(C).

A defendant may be compelled to submit to a mental health examination if he puts his mental condition in issue, either by raising an insanity defense or by arguing

that he lacked the necessary mental state to commit the crime. Such a defendant gives notice of an intention to rely on psychiatric testimony and has "opened the door" to an examination by an expert appointed on motion of the State. This is somewhat analogous to the rule that a defendant who elects to testify at trial may not invoke the self-incrimination privilege to avoid cross-examination; to hold otherwise would deprive the state of the only adequate means to contest the conclusions of a defense psychiatric expert. Therefore, such an examination does not violate the defendant's privilege against self-incrimination. *State v. Schackart*, 175 Ariz. 494, 500-501 (1993), *cert. denied*, 511 U.S. 1046.

Rule 11.7(b)(1) makes it clear that, in the absence of defendant's consent, the State may not call the examining psychiatrist as a witness to place the defendant's statements before the jury without violating the defendant's fundamental rights. But a defendant can consent to the use of his or her statements by calling a doctor to prove insanity; a defendant may not use privilege as both a shield and a sword. A waiver can be implied when a party injects a matter that, in the context of the case, creates such a need for the opponent to obtain the information allegedly protected by the privilege that it would be unfair to allow that party to assert the privilege. *State v. Hon. Hegyi/Rasmussen*, -- Ariz. --, ¶ 13 (App. June 23, 2016), citing *State v. Fitzgerald*, 232 Ariz. 208, 217, ¶ 44 (2013), *State v. Wilson*, 200 Ariz. 390, 396, ¶ 16 (App. 201), *State v. Tallabas*, 155 Ariz. 321 (App. 1987).

Thus, a defendant who undergoes a court-ordered mental health examination has a Fifth Amendment right privilege against self-incrimination, and under Rule 11.4 any statements to the examiner about the facts of the case must be redacted. But, if the

defendant gives notice that he will raise the guilty except insane defense, the court will imply consent to any evidence relating to the expert's report, including disclosure of the defendant's statements at the time of the examination, to the extent such statements relate to the issue of guilty except insane, including statements that he did not know the criminal act was wrong. Although the defendant must disclose the complete unredacted reports of both appointed and retained experts, the State cannot use them at trial to prove any element of its case; the State may only use the statements to the extent they relate to whether the defendant was guilty except insane or underlie the examiner's opinion on the issue. *State v. Hon. Hegyi/Rasmussen*, -- Ariz. --, ¶¶ 19-21 (App. June 23, 2016).

The Fifth Amendment privilege against self-incrimination applies to the penalty phase of a capital murder prosecution. However, a defendant waives the privilege by offering evidence relevant to his mental health during the penalty phase of a capital murder prosecution, for example by presenting mental-impairment mitigation evidence. Even if Rule 11.7 might apply in the penalty phase, under Rule 11.7(b)(1) such a defendant consents to the admission of his statements to mental health experts during the pretrial competency proceedings as rebuttal evidence. *State v. Fitzgerald*, 232 Ariz. 208, 216-17, ¶¶ 43-44 cert. denied, 134 S. Ct. 526 (2013). Moreover, any contention that the defendant's incompetency precluded him from knowingly waiving his constitutional rights at the time such statements were made is unavailing. "The defendant cannot cast aside the protection of the privilege for matters that benefit him and then invoke the privilege to prevent the prosecution from inquiring into matters that

may be harmful to him." *Id*. at 217, ¶¶ 45-46, *quoting State v. Tallabas*, 155 Ariz. 321, 324 (App. 1987).

Further, there is no violation of the Fifth Amendment privilege against self-incrimination where the defendant, upon advice of counsel, voluntary chooses not to reveal important information to a court-appointed expert during mental competency proceedings such that the expert lacked sufficient information to form accurate opinions about the defendant's state of mind at the time of the offense. *State v. Jenkins*, 193 Ariz. 115, 121, ¶ 22-23 (App. 1998).

Finally, under A.R.S. § 13-4508(F) any statement made by the defendant during a Rule 11 examination or any evidence resulting from that statement is not subject to disclosure pursuant to A.R.S. § 36-509 (Confidential records; immunity).

VI. INITIAL COMPETENCY DETERMINATION

The court must hold a hearing to determine competency within 30 days of the submission of the appointed expert's report. The parties may introduce other evidence regarding the defendant's mental condition or may submit the matter by written stipulation on the expert's report. A.R.S. § 13-4510(A); Rule 11.5(a). The defendant may extend this time for good cause. *See Nowell v. Rees*, 219 Ariz. 399 (App. 2008). If the court finds the defendant is competent to stand trial, the proceedings must then continue without delay. A.R.S. § 13-4510(B); Rule 11.5(b)(1); *State v. Silva*, 222 Ariz. 457, 460, ¶ 15 (App. 2009).

The determination of competency to stand trial is always and exclusively a question for the court. Although the court may appoint mental health experts to assist it in its determination, it is not bound by their opinions; the determination of both fact and

law is the court's. *Bishop v. Superior Court*, 150 Ariz. 404, 408 (1986). *See also State v. Glassel*, 211 Ariz. 33, 44, ¶ 28, *opinion corrected on denial of reconsideration*, 211 Ariz. 370 (2005) (court may base its findings not only on expert testimony but also on its own observations of a defendant's interaction with counsel in the courtroom).

Competency determinations are reviewed for an abuse of discretion. The appellate court does not reweigh the evidence but instead determines whether reasonable evidence supports the trial court's finding that the defendant was competent, considering the facts in the light most favorable to sustaining the trial court's findings. *State v. Lewis*, 236 Ariz. 336, 340, ¶ 8 (App. 2014), *review denied* (Sept. 1, 2015); *State v. Murdaugh*, 209 Ariz. 19, 27, ¶ 33 (2004). The standard of review for denial of a competency hearing is also one of abuse of discretion. *State v. Taylor,* 160 Ariz. 415 (1989).

A. Incompetent and Not Restorable

A.R.S. § 13-4517 and Rule 11.5(b)(2) provide that if the court finds the defendant is incompetent and there is no substantial probability that he or she will become competent within 21 months of the finding of incompetence, it may, upon request of any party, remand the defendant for civil commitment proceedings under A.R.S. § 36-501 et seq., appoint a guardian under A.R.S. § 14-5101 et seq., and/or release the defendant from custody and dismiss the charges without prejudice. *See also Rider v. Garcia ex rel. County of Maricopa*, 233 Ariz. 314, 316, ¶ 7 (App. 2013)(when court finds defendant is incompetent and no substantial probability that he will regain competency within 21 months of the initial incompetency determination, it may do any or all of the following: (1) order the institution of civil commitment proceedings under Chapter 5 of Title 36 of

the Arizona Revised Statutes; (2) appoint a guardian under Title 14; or (3) dismiss the charges without prejudice); *State v. Silva*, 222 Ariz. 457, 460, ¶ 15 (App. 2009); *Nowell v. Rees,* 219 Ariz. 399, 406, ¶ 21, (App. 2008).

B. Misdemeanors

If defendant has previously been adjudicated incompetent, the court may hold a hearing to dismiss any misdemeanor charges. The court must give the prosecutor and the defendant 10 days notice of this hearing, and the prosecutor must notify the victim. A.R.S. § 13-4504(A). If the misdemeanor charge is dismissed, the court may order the prosecutor to initiate civil commitment or guardianship proceedings. A.R.S. § 13-4504(B).

C. Incompetent but Restorable

If the court initially finds the defendant is incompetent to stand trial, it must order treatment for the restoration of competency, unless there is clear and convincing evidence that the defendant will not be restored to competency within 15 months. The court may extend the restoration treatment by 6 months if the court determines the defendant is making progress toward the goal of restoration. A.R.S. § 13-4510(C); Rule 11.5(b)(3). In addition, Rule 11.5(b)(3) provides that if the court finds the defendant incompetent, it must determine whether the defendant should be subject to involuntary treatment. Restoration treatment is the preferred course; dismissal of the charges should only occur when there is clear and convincing evidence that the defendant will not be restored to competency within 15 months. *State v. Silva*, 222 Ariz. 457, 460, ¶ 15 (App. 2009).

The initial determination of incompetence raises a rebuttable presumption of continued incompetence. Nevertheless, restoration treatment most often results in restoration to competence or a discovery the defendant had been malingering. *State v. Lewis*, 236 Ariz. 336, 340-41, ¶ 10 (App. 2014), *review denied* (Sept. 1, 2015). The trial court cannot make a subsequent finding of competence unless some new evidence, either of restoration or malingering, is presented to rebut the presumption of continued incompetence. But this presumption disappears entirely upon the introduction of any contradicting evidence. When such evidence is introduced, the existence or non-existence of the presumed incompetence is to be determined exactly as if no presumption had ever been operative. Thus, evidence demonstrating the defendant is competent or invalidating the original determination of incompetence, such as evidence of malingering, will suffice to remove the presumption of continued incompetence. *Id.* at 341, ¶ 14.

If after receiving restoration treatment the defendant is found to have regained competency, the regular proceedings shall commence again. *State v. Silva*, 222 Ariz. 457, 460, ¶ 16 (App. 2009); A.R.S. § 13–4514(D); Ariz. R.Crim. P. 11.6(c).

VII. RESTORATION

If the court finds the defendant is incompetent to stand trial, it must determine: (1) whether the defendant is incompetent to refuse treatment, including medication, and should be subject to involuntary treatment; and (2) the maximum sentence the defendant could have received if convicted, without considering any sentence enhancements. A.R.S. § 13-4511. The Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious

criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. *Sell v. United States*, 539 U.S. 166, 179 (2003).

The procedures for restoration efforts, including the time limits on such efforts, were explicitly enacted to comply with *Jackson v. Indiana,* 406 U.S. 715, 730-731 (1972), holding that indefinite commitment of a criminal defendant due to incompetency to stand trial violates equal protection and due process. *State v. Silva*, 222 Ariz. 457, 460, ¶ 17 (App. 2009); Comment, Rule 11.5(b).

A. Treatment Orders

Once the trial court decides restoration treatment is appropriate, it must specify the details of that treatment in its order. *Nowell v. Rees*, 219 Ariz. 399, 405, ¶ 17 (App. 2008). All treatment orders issued by the court must specify: place of treatment; transportation to treatment site; length of treatment; transportation after treatment; and frequency of reports. A.R.S. § 13-4510(D). Similarly, Rule 11.5(b)(3) requires that treatment orders specify the place of treatment, whether treatment is inpatient or outpatient under A.R.S. 13-4512(A), transportation to treatment, length of treatment, transportation after treatment, and that the court must be notified if the defendant regains competency before the expiration of the order of commitment. Rule 11.5(c) provides that the court may modify these orders at any time. Under A.R.S. § 13-4513, the court must appoint a clinical liaison to coordinate the continuity of care following restoration.

The court may order a defendant to undergo out of custody restoration treatment; if it finds confinement is necessary, it must commit the defendant to a restoration program designated by the county board of supervisors. A.R.S. § 13-4512(A). If there is no designated program, the court may commit the defendant to the Arizona State Hospital (ASH) or any other court-approved facility. A.R.S. § 13-4512(B). A county restoration program may contract with providers such as ASH, and treatment may be provided in the county jail. A.R.S. § 13-4512(C). The court must select the least restrictive treatment alternative after considering: (1) whether confinement is necessary for treatment; (2) whether the defendant is a threat to public safety; (3) the defendant's cooperation with outpatient examinations conducted under A.R.S. 13-4507; and (4) the defendant's willingness to submit to outpatient treatment as a condition of release, if eligible for release. A.R.S. § 13-4512(D).

The order must state whether the defendant is incompetent to refuse treatment, including medication, under A.R.S. § 13-4511. A.R.S. § 13-4512(E). Before a court may order forced medication of a defendant with anti-psychotics to restore competency pursuant to AR.S. §§ 13-4511, 4512(E), it must determine, by clear and convincing evidence on each factor, that: (1) *important* governmental interests are at stake in prosecuting the defendant on the offense charged; (2) involuntary medication will *significantly further* those interests, meaning it is substantially likely defendant will be restored and substantially unlikely the side effects will impair significantly the ability to assist in the defense; (3) involuntary medication is *necessary* to further those interests, that is, less intrusive treatments that are likely to achieve the same results do not exist; and (4) administration of the drugs is *medically appropriate*, *i.e*., in the patient's best

medical interest in light of his or her medical condition. *Cotner v. Hon. Liwski*, 2017 WL 3498445, ¶ 9 (August 16, 2017), *citing Sell v. United States*, 539 U.S. 166, 180-181 (2003). Involuntary antipsychotic medication represents a substantial interference with a person's liberty, threatening the person's mental, as well as physical, integrity. The proper application of *Sell* ensures this kind of intrusion may occur under only the most compelling circumstances, which "may be rare." *Cotner*, ¶ 27, *quoting Sell*, 539 U.S. at 180.

With respect to the first factor, there is a 2-step inquiry; first, the charge must be sufficiently serious to establish an important state interest, and if that threshold is met, then the court must determine whether there are special circumstances that lessen that interest. *Cotner*, ¶¶ 11-16 (finding court erred in finding first Sell factor based only on state's general interest in prosecuting criminal cases expeditiously and protecting the victims' rights). As to the last three factors, the court must consider the specific drugs involved, possible side effects, and their efficacy; that a certain treatment plan may be generally effective is insufficient. The need for a high level of detail is plainly contemplated by the comprehensive findings *Sell* requires. *Id*., ¶¶ 19-23. The fact that a physician prescribes medication does not, standing alone, make it medically necessary and appropriate for purposes of *Sell*. These determinations require rigorous analysis. *Id*., ¶ 26.

A.R.S. § 13-4512(F),(G),(H) concern the costs of both inpatient and outpatient treatment; basically, the defendant must pay all or part of the costs but if indigent, the costs are borne by the county or the city if the proceedings arise in municipal court. Finally, under A.R.S. § 13-4512(I), the treatment order is valid for 180 days or until: (1)

the treatment facility submits a report that either the defendant has regained competency or that there is no substantial possibility that he will do so within 21 months after the date of the original finding of incompetence; (2) the charges are dismissed: (3) the maximum sentence has expired; or (4) a qualified physician from ASH finds the defendant is not suffering from a mental illness and is competent to stand trial. *Nowell v. Rees*, 219 Ariz. 399, 405, ¶ 17 (App. 2008); see *also* Rule 11.5 comment ("No order under this section is to be effective for longer than six months, thereby insuring a frequent review of each incompetent's status and progress.").

Absent any of the circumstances listed in § 13-4512(I)(1), the next stage is for the trial court to evaluate the progress of the restoration treatment. *Nowell v. Rees*, 219 Ariz. 399, 405, ¶ 17 (App. 2008).

B. Restoration Progress Reports

The trial court must order periodic progress reports from the person supervising the restoration treatment. *Nowell v. Rees*, 219 Ariz. 399, 405, ¶ 17 (App. 2008). Under A.R.S. § 13-4514(A) and Rule 11.5(d), the court must order the treatment supervisor to file a report with the court, the prosecutor, defense counsel, and the clinical liaison as follows:

> (1) for inpatient treatment, 120 days after the court's original treatment order and each 180 days thereafter:
> (2) for outpatient treatment, every 60 days;
> (3) when the supervisor believes the defendant is competent;
> (4) when the supervisor concludes the defendant will not be restored to competence within 21 months of the initial finding of incompetence; and
> (5) 14 days before the expiration of the court's treatment order.

Under § 13-4514(B) and Rule 11.5(d), the treatment supervisor's report must include: the supervisor's name; a description of the nature, content, extent and results

of the examination and tests conducted; the facts on which the findings are based; and the supervisor's opinion on competency. Further, if the supervisor finds the defendant remains incompetent, the report must also include the nature of the mental disease, defect or disability causing the incompetency, the prognosis regarding restoration and time period required for same, and recommendations for treatment modifications. Finally, if the supervisor finds the defendant has regained competence, the report must include and limitations imposed by medications used in treatment.

C. Restoration Hearings

During treatment to restore a defendant's competency, the trial court is required to conduct periodic reviews of the defendant's competency. *State v. Silva*, 222 Ariz. 457, 460, ¶ 16 (App. 2009). Under A.R.S. § 13-4514(C), the court shall hold a hearing to redetermine competency upon the court's own motion, or upon receipt of a report from the treating facility pursuant to subsection (A)(3)(when the supervisor believes the defendant is competent), (A)(4)(when the supervisor concludes the defendant will not be restored to competence within 21 months of the initial finding of incompetence), or (A)(5)(14 days before the expiration of the court's treatment order).

Similarly, Rule 11.6(a), Ariz. R. Crim. P. provides that the court shall hold a hearing: (1) upon receiving a report from the institution in which the defendant is hospitalized that the defendant is competent; (2) upon motion of the defendant accompanied by the certificate of a mental health expert stating that the defendant is competent; (3) at the expiration of the maximum period set by the court; or (4) upon the court's own motion any time. The Rule Comment explains this rule is intended to insure the mental condition of defendants found incompetent will be thoroughly reviewed at

reasonably frequent intervals to obviate the very real danger that a defendant could be incarcerated for months or years on minor charges when his condition would not justify civil commitment (*e.g.,* in any case where the defendant is incompetent but not a danger to himself or others). In addition, *Jackson v. Indiana,* 406 U.S. 715 (1972), established the necessity for frequent review by requiring that the continuing (as opposed to initial) commitment of the defendant must be justified by a showing of progress toward recovery of competency.

Under Rule 11.6(b), the defendant is entitled to counsel during these proceedings, and the court, in its discretion, may appoint new mental health experts pursuant to Rule 11.3. Although a defendant may not be constitutionally entitled to appointed counsel at such proceedings, counsel should be provided as a matter of fairness; a defendant adjudged incompetent and committed to a hospital or therapeutic program for even a short time is hardly capable of defending his own interests. Comment, Rule 11.6.

If after receiving restoration treatment the defendant is found to have regained competency, the regular proceedings shall commence again. *State v. Silva*, 222 Ariz. 457, 460, ¶ 16 (App. 2009); A.R.S. § 13-4514(D); Ariz. R.Crim. P. 11.6(c). The defendant is then entitled to a rehearing of any matter in which his or her previous incompetence may have prejudiced him or her. Rule 11.6(c). This provision requires that the criminal process commence anew (*e.g.,* with a preliminary hearing) whenever there are reasonable grounds to believe that the defendant was prejudiced by his or her previous incompetency. Comment, Rule 11.6(c). The court may order continued involuntary medication if it finds there is no less intrusive alternative, the medication is

medically appropriate, and is essential for the safety of the defendant or others. A.R.S. § 13-4514(D).

If the defendant continues to be incompetent the court must determine whether further restoration attempts are warranted. *Nowell v. Rees*, 219 Ariz. 399, 405, ¶ 18 (App. 2008). If at the hearing the court finds the defendant is incompetent but there is a substantial probability that he or she will regain competency within the foreseeable future, the court must renew and, if appropriate, modify the treatment order for not more than an additional 180 days. The court may make this determination without a formal hearing if all of the parties agree. A.R.S. § 4514(E). But if the court finds the defendant is incompetent and there is not a substantial probability that he or she will regain competency within 21 months after the date of the original finding of incompetency, the court must proceed pursuant to § 13–4517(remand for civil commitment, appoint a guardian, and/or release the defendant and dismiss the charges without prejudice). A.R.S. § 4514(F).

Likewise, Rule 11.6(d) provides that if the court finds the defendant is still incompetent, it must proceed in accordance with Rules 11.5(b)(2) and (3) unless the court finds there is a substantial probability the defendant will regain competency within the foreseeable future, then the court must renew and may modify the treatment order for not more than an additional 180 days. The Comment to this rule explains this section directs the trial court to reconsider the alternatives presented in Rule 11.5(b)(2) in light of *Jackson v. Indiana,* 406 U.S. 715 (1972), holding the continuing commitment of a defendant must be justified by an appropriate showing by the State. Therefore, the initial

findings of the court are not relevant to its options at this point, which should be considered anew.

Pursuant to these provisions, if a defendant continues to be incompetent but restoration still seems likely, treatment may be extended for an additional 180 days. If there is no substantial probability of restoration within 21 months of the original finding of incompetency, any party may request that the court remand the defendant for civil commitment proceedings, order appointment of a guardian, or dismiss the charges without prejudice. Thus, the cycle may continue in one 180 day increments so long as continued treatment seems likely to be successful. *Nowell v. Rees*, 219 Ariz. 399, 405-06, ¶ 19 (App. 2008). But, the cycle does not continue indefinitely. *Id.* at 206, ¶ 20.

D. Restoration Time Limits

An order or combination of orders issued under A.R.S. §§ 13-4512 (initial treatment order) and 13-4514 (continuing treatment order) may not be in effect for more than 21 months or the maximum sentence possible, excluding sentence enhancements, which ever is less. A.R.S.13-4515(A.). When calculating these time requirements, the court may only consider the time a defendant actually spends in a restoration program. A.R.S. 13-4515(B); Rule 11.5(e), Ariz. R. Crim. P.

The procedures for restoration efforts, including the 21-month limit on such efforts, were explicitly enacted to comply with *Jackson v. Indiana,* 406 U.S. 715, 730-731 (1972), holding that indefinite commitment of a criminal defendant due to incompetency to stand trial violates equal protection and due process. *State v. Silva*, 222 Ariz. 457, 460, ¶ 17 (App. 2009); Comment, Rule 11.5(b). *Jackson* did not prescribe a specific time limit on restoration efforts or require dismissal of the charges, but instead

held that when an incompetent defendant cannot attain competency in a reasonable time, "the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." *State v. Silva*, 222 Ariz. at 460-61, ¶ 17, *quoting Jackson* at 738.

The competency statutes and rules thus include an outer limit to the duration of court ordered restoration treatment and the time that treatment may be undertaken – 21 months. If a defendant has not regained competency within 21 months of the original finding of incompetency, no further attempts at restoration are allowed**.** At that point the options available to the trial court are to dismiss the charges without prejudice, appoint a guardian, and/or order the institution of civil commitment proceedings. *Nowell v. Rees*, 219 Ariz. 399, 406, ¶¶ 20-21 (App. 2008).

1. Dismissal without Prejudice

Rule 11.6(e), Ariz. R. Crim. P., provides that the court may in its discretion order the dismissal of the charges against any defendant adjudged incompetent at any time after providing notice and a hearing pursuant to A.R.S. § 13-4515(C). Upon dismissal of the charges, the defendant must be released from custody unless the court finds that the defendant's condition warrants a civil commitment hearing. The Comment to Rule 11.6(e) notes that under *Jackson, supra,* and *Klopfer v. North Carolina*, 386 U.S. 213 (1967), an indefinite suspension of a prosecution violates a defendant's right to a speedy trial. Rule 11.6(e) therefore allows the court, in its discretion, to dismiss the charges. The first provision gives the trial court the power to dispose of the charges at the outset in cases where there is clearly no reason to maintain them (*e.g.,* when the

defendant's condition is permanent and he is charged with a comparatively minor offense).

However, the court need not dismiss the case. *See Rider v. Garcia ex rel. County of Maricopa*, 233 Ariz. 314, 316, ¶ 7 (App. 2013)(when court finds defendant is incompetent and no substantial probability that he will regain competency within 21 months of the initial incompetency determination, it may do *any or all* of the following: (1) order the institution of civil commitment proceedings under Chapter 5 of Title 36 of the Arizona Revised Statutes; (2) appoint a guardian under Title 14; or (3) dismiss the charges without prejudice), *citing* A.R.S. § 13-4517 and Rule 11.5(b)(2).

2. No Dismissal, Continuing Jurisdiction

The 21-month limit in the statute and rule governing competency proceedings applies only to restoration treatment orders during an accused's incompetency – not the superior court's authority to determine competency. A.R.S. § 13-4501(2) and Rule 11.6(a)(4) explicitly allow the court to make this determination “at any time”. After 21 months the court has three options: dismiss the charges without prejudice, appoint a guardian, or order the institution of civil commitment proceedings. If the prosecution is not dismissed and the defendant is directed to receive further restoration treatment through either civil commitment or appointment of a guardian, the court has continuing authority to determine competency to stand trial in the criminal proceeding because civil commitment or guardianship proceedings may act as “further restoration treatment.” *State v. Silva*, 222 Ariz. 457, 461, ¶ 18 (App. 2009).

In *Silva*, the Court of Appeals held the trial court had authority to determine the defendant was competent to stand trial even though the defendant had been subject to

more than 32 months of restoration treatment. The Court distinguished *Nowell v. Rees*, 219 Ariz. 399, 401-02, ¶¶ 3-5 (App. 2008), where there was only one determination that the defendant was incompetent. In *Silva,* the defendant was placed in restoration treatment three different times and was never in restoration treatment at any time in excess of 21 months; the Court declined to tack these restoration periods together to get over the "21-month hurdle." *State v. Silva*, 222 Ariz. 457, 462, ¶¶ 24-26 (App. 2009).

In the juvenile context, the Court of Appeals held that the juvenile competency statutes, granting a total of 240 days to restore juvenile to competency, do not require that the juvenile court hold the final restoration review hearing and make its final competency determination before the expiration of the restoration order or within the 240-day restoration period. *In re Eric W*., 229 Ariz. 107, 114, ¶ 23 (App. 2012).

3. Bad Faith Attempts to Delay Treatment

The trial court also has authority to deal with bad faith attempts by defendants to delay treatment. *Nowell v. Rees*, 219 Ariz. 399, 406-407, ¶ 24 (App. 2008). Although not in issue in *Nowell*, this issue was expressly taken up in *In re Eddie O*., 227 Ariz. 99, 103, ¶ 14 (App. 2011). There, in the juvenile context,[3] the Court held any time periods the juvenile did not in good faith participate in the restoration process may be excluded from the statutory time limit for restoration of competency. The burden is on the State to

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[3] Unlike the adult context, with restoration procedures explicitly enacted to comply with *Jackson v. Indiana,* 406 U.S. 715, 731 (1972), restoration in the juvenile setting more often involves an educational process rather than treatment of a mental defect. Thus, restoration often occurs outside of a confined setting and gives a different context to the juvenile competency statutes. *In re Eddie O*., 227 Ariz. 99, 103, ¶¶ 15-16, n. 4 (App. 2011), *distinguishing Nowell v. Rees,* 219 Ariz. 399 (App. 2008) (reserving bad faith issue); *citing State v. Silva*, 222 Ariz. 457, 460, ¶ 17 (App. 2010).

make this showing. *Id.* Facts that may be considered include: probation reports seeking to revoke release conditions based upon noncompliance with restoration; the commission of more crimes; inability of caretakers to control, supervise or parent the juvenile in the home environment; and gaps in restoration service during time periods in which the juvenile could not be located. *Id*. at 104, ¶¶ 17-18. *See also* A.R.S. 13-4515(B) and Rule 11.5(e), Ariz. R. Crim. P. (providing that when calculating time requirements, the court may only consider the time a defendant actually spends in a restoration program).

4. Refiling Charges after Dismissal and Civil Commitment

The question of attempts at restoration in the context of refiled criminal charges after dismissal and civil commitment, which was not reached in *Nowell v. Rees*, 219 Ariz. 399, 407, ¶ 25 (App. 2008), was expressly taken up in *Rider v. Garcia ex rel. County of Maricopa*, 233 Ariz. 314, 316, ¶ 8 (App. 2013).

The Court noted under *State v. Silva*, 222 Ariz. 457, 461, ¶ 18 (App.2009), civil commitment proceedings are different from criminal competency restoration proceedings; the treatment that a person receives while civilly committed may have the result of restoring competency. When the criminal charges are not dismissed, the court retains continuing authority to rule on the issue of defendant's competency after the 21-month limit on restoration treatment orders because civil commitment or guardianship proceedings may act as further restoration treatment. Additionally, A.R.S. § 13–4517(3) and Rule 11.5(b)(2)(iii) provide that when charges are dismissed, the dismissal must be "without prejudice," which necessarily implies that the State may refile charges if post-

dismissal events suggest that the defendant has regained competency. *Rider v. Garcia ex rel. County of Maricopa*, 233 Ariz. 314, 316-317, ¶ 9 (App. 2013).

The Court noted the State's ability to refile charges has limits; in some cases, the reinstitution of charges may be barred by the statute of limitations; further, under *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the State may not continually refile charges for the purpose of holding a defendant based only on his chronic incompetence to stand trial; such a defendant must be either released or civilly committed. *Rider v. Garcia ex rel. County of Maricopa*, 233 Ariz. 314, 317, ¶ 10 (App. 2013). But the State acts within the bounds of its discretion where the refiled charges are not time-barred, the State has reasonable grounds to believe the defendant might have regained competency based on statements of hospital, outpatient care provider, and the defendant's psychologist, and other evidence suggests the previous hospitalization had been effective to restore defendant to competency in a case in another state. *Id***.** ¶¶ 11-12.

VIII. RECORDS

A.R.S. § 13-4508(E) provides that after a guilty plea, guilty except insane verdict, or after the defendant is found not restorable to competence, the court must order that the mental health examination reports be sealed. The court may order they be opened only: (1) for use by the court or defendant, or by the prosecutor if otherwise permitted by law, for further competency or sanity evaluations; (2) for statistical analysis; (3) when the records are necessary to assist in mental health treatment under A.R.S. §§ 13-502 or 13-4517; (4) for use by the probation department or the department of corrections if the defendant is in custody; (5) for use by a mental health treatment provider that

provides treatment to the defendant or that assesses the defendant for treatment; (6) for data gathering; or (7) for scientific study. Under § 13-4508(F), any statement made by the defendant during an examination or evidence resulting therefrom is not subject to disclosure under § 36-509 (pertaining to disclosure of records maintained by health care entities).

Similarly, Rule 11.8 provides that the reports of the experts must be treated as confidential by the court and counsel in all respects, except the reports of other experts may be disclosed by the court and counsel to other mental health experts in proceedings related to Chapter 41 or as excluded in § 13-4508 (privilege against self-incrimination) and 13-4516. After the case proceeds to trial or the defendant is found to be unable to regain competence, the court must order the mental health reports sealed. The court may order the reports opened only for further competency or sanity evaluation, statistical study, or when necessary to assist in mental health treatment pursuant to restoration of competency or A.R.S. § 13-502.

Under A.R.S. § 13-4516(A), the court must notify the central state repository established by § 41-1750 of any commitment ordered or release authorized under Chapter 41. A.R.S. § 13-4516(B) requires the court and the department of heath services to keep records of the offense for which a defendant was charged, any court ordered examinations, and treatment outcomes.

Finally, the testing materials used and raw data compiled by defense experts may be subject to protective orders. *See* Ariz. R. Crim. P. 11.4, 11.7, 11.8, 15.5; A.R.S. §§13-4508, 13-4509.